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In the
Supreme Court of the United States.

OCTOBER TERM, 1952

No. 734 1/1

F. W. WOOLWORTH CO.,
Petitioner,

v.

CONTEMPORARY ARTS, INC.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI.

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I. STATEMENT OF THE CASE.

Petitioner's Summary Statement of the Matter Involved does not adequately state the facts required for consideration of the questions presented. A fuller statement follows:

The copyright involved in this case is an original sculpture and work of art entitled "Cocker Spaniel in Show Position", designed in 1942 by Elizabeth Philbrick, who uses the professional name of "Jan Allan". The copyright was duly registered with the Register of Copyrights with deposit of copies, and Certificate No. 39960, Class G Pub. issued with a publication date of March 26, 1942 (Plf's. Exh. 3, Rp. 252), and was duly assigned to Respondent (Rp. 253). Respondent is a Massachusetts corporation with a place of business in Boston, and is engaged in the business of designing, manufacturing and selling small sculptured figurines and statuettes. It is a small business, doing \$35,000. gross annually with eight employees (Rp.

110). Their sculptures include dancing and national figures and objects, and authentic dog models, which are sold in art and gift shops and to dog fanciers. Respondent's sculptures are all original designs and great care is taken to make their dog models authentic, realistic and true to type (Rp. 49). Prize winning dogs are studied and dog experts are consulted in creating every dog model. Respondent makes its Cocker Spaniel in Show Position in a red plaster model selling at retail for \$4.00 (Plf's. Exh. 5), in red porcelain selling for \$9.00 (Plf's. Exh. 6) and in a fine black and white porcelain selling for \$15.00 (Plf's. Exh. 7). *These three models are one identical sculpture, merely reproduced in different media.* The same sculpture could be cast in metal, if desired. *All models are made from an identical master model.* But different media require different treatments—the porcelain requires glazing for instance—and porcelain shrinks in baking. Porcelain further requires a hard mold, instead of the flexible rubber mold used in making plaster models; and undercuts therefore have to be eliminated to permit removal of the model from its hard mold (Rp. 51-61). Thus the differences between Respondent's plaster and porcelain models (except for color which, of course, is optional) are due solely to the different techniques and requirements of reproducing in porcelain instead of plaster.

These facts alone dispose of Petitioner's Point II.

The infringement proved was the sale of ceramic models of Respondent's copyrighted Cocker Spaniel by the Woolworth Company—Plf's. Exh. 1 and Def't's. Exh. A. Respondent's proofs established beyond question that the Woolworth dog was copied directly from one of Respondent's copyrighted dogs by using it as a physical model (Rp. 61-63; 99; 104-5). The Lepere Pottery Company of Zanesville, Ohio was the manufacturer of the infringing dogs, and had scratched hairlines on the dog's coat in an

effort to change its appearance. In casting in ceramic from a hard mold, undercutting around the feet had to be removed, and the ceramic model necessarily shrank in baking (Rp. 100-101; 184-191). But otherwise the Petitioner's dogs were identical with Respondent's red plaster model (Plf's. Exh. 5). The Woolworth Company bought 127 dozen of the infringing dogs from the Sabin Mfg. Co. of McKeesport, Pennsylvania which in turn bought them from Lepere Pottery. The Woolworth Company sold the infringing models at \$1.19 retail.

The creation of the original sculpture by Miss Philbrick and its physical copying by the Lepere Pottery Co. was clearly proved, and the validity of the plaintiff's copyright and its infringement could not be disputed.

The only defense was an utterly preposterous story by one Harry Moyer, an employee of the Lepere Pottery Company, that by a remarkable coincidence he himself had created *the identical design* of the Respondent's Cocker Spaniel in Show Position, in 1938, four years earlier than Miss Philbrick. He produced a gray plaster model (Def't's. Exh. F) marked on the bottom "A.M.Co. 1938" and said it was "an exact dog of the one which I made for Burley Pottery in 1938" from an English Cocker Spaniel which had been given to him (Rp. 134). He said he had found the gray plaster model in a cabinet at the Lepere Pottery Co. in the early part of 1950, and that it was there when he became employed by Lepere in 1945. Moyer admitted that he had no sculpturing experience (Rp. 142-152), was not a dog expert, knew nothing about Cocker Spaniels, and that his own English Cocker Spaniel was "very heavy coated" (Rp. 146) and had never been shown or trimmed for showing purposes. But Miss Philbrick had testified that her own Cocker Spaniel was her effort to create "an ideal *American Cocker Spaniel*", her dog was shown in show position and had been trimmed for showing. The

"A.M.Co. 1938" was never explained. Moyer's oral testimony was wholly uncorroborated by any documentary evidence. Petitioner's gray plaster model (Def't's. Exh. F) however, is *identical in measurement, in length, width and height of head, body, legs and tail and in conformation of hair with plaintiff's plaster model* (Plf's. Exh. 5) as Miss Philbrick showed *when she applied her calipers to the two models* (Rp. 188). Such identity in the minutest detail could not possibly be a coincidence. Petitioner's gray plaster model (Def't's. Exh. F) was obviously copied directly from one of plaintiff's plaster models, such as Plf's. Exh. 5, with hairlines added to avoid the appearance of infringement (Rp. 184-192).^{*} The District Court refused to give the Moyer testimony any credence whatever (Opinion Rp. 22-24). The testimony was of course an insult to the Court's intelligence and Moyer was exceedingly fortunate to avoid being held for perjury. The situation was exactly the same as if the copyrighted work had been a novel, and the defendant contended that by a coincidence he had written the same novel earlier than the plaintiff, and produced an earlier dated manuscript *identical to the last word* in support of his defense, the defense otherwise being wholly uncorroborated.

Moyer's testimony further conflicted with previous statements as to the origin of the infringing Woolworth model (Plf's. Exh. 1) appearing in the letter of the Sabin Company to the Woolworth Company dated October 31, 1949 (Plf's. Exh. 15; Rp. 255) which stated:

"In regard to your recent letter, I am sorry this was not answered sooner, but I have checked quite thoroughly into the matter. We have purchased these

^{*}Very significantly Petitioner has not included its gray plaster model (Def't's Exh. F) among the physical exhibits requested to be sent to this Court.

molds from a pottery who has been making this dog since 1936.

"Please be advised that he states this was copied from a glass dog made in England. However, he is trying to find the original of this dog and up to the present writing, we have been unable to secure this sample. However, we would like to know when this copyright was put into effect."

No evidence was produced supporting these conflicting statements. But the letter shows that Lepere and Sabin had entirely changed their story in the meantime.

Moyer further testified that he had registered his own copyright on the infringing dog on February 11, 1950 (Rp. 38-39; 155-157). Yet it was asserted that the Lepere Pottery had been selling the infringing models since January 1948 and Sabin Mfg. Co. had sold them to Woolworth in March, April and May 1949, *all without notice of copyright*. (Rp. 134-135, 139; 152-3). It is elementary law of course that any copyrightable work publicly sold without notice of copyright is abandoned to the public and copyright protection cannot thereafter be secured.* Moyer thus in addition defrauded the Copyright Office in registering his own copyright on February 11, 1950 and in concealing the fact of the previous sale of his models without notice of copyright from the Copyright Office.

We ask the Court to note that the Woolworth Company has an indemnity agreement with the Sabin Company. Sabin wrote Woolworth (Rp. 256):

* *Universal Film Mfg. Co. v. Copperman*, 212 F. 301 (D.C.S. D.N.Y. 1914); *aff.* 218 F. 577 (C.C.A. 2, 1914);

Fleischer Studios Inc. v. Ralph A. Freundlich, Inc., 73 F. (2d) 276, at 277 (C.C.A. 2, 1934);

Smith v. Bartlett, 18 F. Supp. 35 at 37 (D.C.D. Me. 1937);

Wildman v. New York Times Co., 42 F. Supp. 412 at 414-415 (D.C.S. D. N.Y. 1941).

"We will go along with you and assume all cost regarding any damage or expense connected therewith."

Respondent admittedly was unable to prove its damages, from lost sales and the like, with the certainty required by law and consequently was forced to invoke the Statutory Damage provision of the Copyright Act (Title 17, U.S.C. Sec. 101(b)—which allows the trial Court, *in lieu of actual damages and profits* and in its discretion, to award statutory damages from \$250. to \$5000. at the rate of \$10. per infringing copy (in the case of sculptures and works of art).

Petitioner did not prove its profits. It merely showed that it had bought 1524 of the infringing models, at a cost of 60 cents each and had sold them for \$1.19 each. Petitioner made no effort to prove its selling costs and hence its net profits, which at most would have been about 2% of gross sales. On the facts stated and in its discretion the District Court awarded the plaintiff \$5000. statutory damages (Opinion Rp. 24-25). The District Court also awarded Respondent an attorney's fee of \$2000. cutting Respondent's requested fee of \$3945 (263 hours spent at \$15.00 per hour) approximately in half.

On appeal the court of Appeals for the First Circuit affirmed the judgment of the District Court in awarding \$5000. statutory damages and granted Respondent an additional \$500. attorney's fee in the Court of Appeals.

II. REPLY TO PETITIONER'S POINT I.

Petitioner contends that the decision below construes the "in lieu" clause of Sec. 101(b) of the Copyright Act in conflict with a decision of the Court of Appeals for the Second Circuit and in probable conflict with decisions of this Court and other Federal Courts.

Petitioner's Point I is wholly without merit. The damages section of the Copyright Act (formerly Sec. 25(b),

and now Title 17, U.S.C. Sec. 101(b) so far as here immaterial reads:

“(b) Damages and profits; amount; other remedies.

“To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated. . . . and such damages shall in no other case exceed the sum of \$5,000. nor be less than the sum of \$250. and shall not be regarded as a penalty. . . .”

The language of the Statute is clear and express: The copyright proprietor may recover such actual damages as he “may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement” . . . “or *in lieu of actual damages and profits, such damages as to the Court shall appear to be just*, and in assessing such damages the Court may, in its discretion, allow the amounts as hereinafter stated, . . . and such damages . . . shall not be regarded as a penalty.”

Congress thus gave the District Court entire discretion in allowing the copyright proprietor *either actual provable damages and actual provable profits, or statutory damages within the amounts stated*—in an effort to provide an adequate and effective remedy against piracy and wilful infringement and to discourage the very contempt of the copyright laws and the courts which the Petitioner displays in the present case.

It was just for such a case as this that Congress in revising the Copyright Act in 1909 added the statutory damage provision. While the Copyright Act of 1909 was pending before Congress, the Print Publishers of America addressed a memorandum to the Joint Committee considering the proposed Act which stated in part:

"Under the present law it is notorious that there are no effective remedies for piracy in 90 per cent of the cases that arise. In our own domain recoveries are so rare that general contempt of the law exists. . . . The impunity with which the present law can be violated has encouraged infringements in this country to such an extent that many of the infringers have come to look upon their appropriations as vested rights. Naturally they are disturbed when effective remedies are proposed."

It had been found that *actual damages and profits* were exceedingly difficult to prove in copyright cases and were frequently grossly inadequate, and that the previous Copyright Act was ineffective in preventing piracy of copyrighted works. Here there has been a flagrant piracy of Respondent's copyrighted work, with no bona fide defense. But Petitioner has compelled Respondent to bring suit and has put up a preposterous defense based on perjured testimony. Petitioner's evident purpose is to cause Respondent so much expense that it will never again try to protect its copyrighted designs from Petitioner's piracy.

This Court has already construed Sec. 101(b) in *Douglas v. Cunningham*, 294 U.S. 207 (1935). In that case the plaintiff was unable to prove any actual damages or profits and the District Court awarded maximum damages of \$5000. at the rate of \$1.00 per infringing copy of the plaintiff's story up to 5000 copies. The Court of Appeals for the First Circuit reversed, holding that under the circumstances the

District Court could award only the minimum statutory damages of \$250. This Court reversed the Court of Appeals, restoring the award of \$5000, maximum damages. Mr. Justice Roberts said as to Sec. 25(b) (now Title 17, U.S.C. Sec. 101(b)) at page 209:

"The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render *difficult or impossible proof of damages or discovery of profits*. In this respect the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. *The ineffectiveness of the remedy encouraged wilful and deliberate infringement.*"

This Court again construed Section 25(b) in *Jewell LaSalle Realty Co. v. Buck*, 283 U.S. 202 at 207-208 (1931), in a case where there was no proof of actual damages or profits.

This Court similarly construed Sec. 25(b) in *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 and particularly at pages 106-107 (1919).

In the meantime Sec. 101(b) has been liberally construed by the lower courts in the manner intended by Congress, to give the District Court complete discretion to award actual provable damages and actual provable profits, or where these are difficult to prove or are inadequate, and in lieu thereof, to award statutory damages.

See:

S. E. Hendricks Co. v. Thomas Publishing Co., 242 F. 37 (C.C.A. 2, 1917) where the Court of Appeals upheld the

award of \$2500. statutory damages for 2800 copies of an infringing book as within the discretion of the District Court. Judge Hough there said (p. 41):

“As is well known, the language of this section is a growth of years resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it *difficult, if not impossible (as it often is), to prove damages or discover profits.*

“That keeping plaintiff out of a possible market for 2,800 copies of its own publication, by the issuance of a book competitive in every sense of the word; works some considerable injury, is a matter too plain to require more than statement. *That assessment of damages or ascertainment of profits under the facts hereinabove recited would be not only difficult but expensive is similarly obvious.* We entertain no doubt that it was the intention of Congress (1) to preserve the right of a plaintiff to pursue damages and profits by the historic methods of equity if he chooses so to do; and (2) to give the new right of application to the court for such damages as shall ‘appear to be just’, in lieu of actual damages. . . .

“... in the present cause experience informs the court that \$250 would not and could not compensate plaintiff for a damage obvious, but difficult of exact admeasurement. It covers the matter in hand to repeat what we held in the Mail & Express Case, supra, that, where obvious and substantial pecuniary injury has been wrought, \$250 is the minimum award, and to approve the above-quoted language of Hand, J. *that the intent of the statute (under circumstances such as*

the present) *was to authorize the court to estimate the damages within the statutory limits, without being bound to or by legal proof.*"

Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F. (2d) 282 at 283-4 (C.C.A. 8, 1939) where the Court of Appeals affirmed the award of \$250. statutory damages for printing the lyrics of plaintiff's copyrighted songs, *where defendant admitted actual net profit from the infringement of \$5.10.*

Toksvig v. Bruce Publishing Co., 181 F. (2d) 664 at 667-8 (C.A. 7, 1950), where the Court upheld an award of \$1000. statutory damages even though the evidence disclosed that the defendant Bruce had sold 14,262 copies of the infringing book *at a net profit of 5 to 10 cents per book.*

Adventures in Good Eating v. Best Places to Eat, Inc., 131 F. (2d) 809 (C.A. 7, 1942) where the Court upheld an award of \$3500. statutory damages for 3500 copies of the infringing book, which defendant had sold at 50 cents per copy, and obviously at a profit.

General Drafting Co. v. Andrews, 37 F. (2d) 54 (C.C.A. 2, 1930), a map case, where the Court upheld an award of \$2000. statutory damages, where 5000 copies of the infringing map had been sold at a profit, but plaintiff waived an accounting and it did not appear that plaintiff's business was materially injured.

Widenski v. Shapiro, Bernstein & Co. Inc., 147 F. (2d) 909 at 911-12 (C.A. 1, 1945) where the Court upheld an award of \$250. statutory damages for infringement of a musical copyright. The plaintiff had an established license fee of \$10. per month or \$90 annually, and defendant argued that the loss of this royalty was *actual provable damages, provable with mathematical certainty*, and that the plaintiff could recover no more. But the Court of Appeals held it was inadequate damages and that the District Court in its discretion had properly awarded statutory damages.

Hartfield v. Peterson, 91 F. (2d) 998 (C.C.A. 2, 1937) where the Court of Appeals affirmed an award of \$5000. statutory damages for infringement of a copyrighted cable and telegraphic code, which defendant had obviously sold at a profit.

Campbell v. Wireback, 269 F. 372 at 375-6 (C.C.A. 4, 1920) where the Court of Appeals upheld an award of \$4000. statutory damages for 4000 infringing copies of advertising cuts of its orthopedic devices, which defendant had copied from plaintiff at an obvious saving to the defendant.

No-Leak-O-Piston Ring Co. v. Norris, 277 F. 951 at 954 (C.C.A. 4, 1921) where the Court of Appeals upheld the award of \$3000 statutory damages for distribution of 15000 copies of an infringing pamphlet, containing information as to piston rings, which defendant had copied from the plaintiff at an obvious saving to the defendant.

It is plain from the foregoing that the intent of Congress was "to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits", as Mr. Justice Roberts said in *Douglas v. Cunningham*, 294 U.S. 207 at 209. The District Courts regularly and properly award statutory damages, in the manner intended by Congress even though some actual damages or actual profits may be ascertainable, where they are so small and inadequate that they do not provide an effective remedy to prevent wilful and flagrant piracy.

Widenski v. Shapiro, Bernstein & Co., 147 F. (2d) 909 (C.C.A. 1, 1945), where \$10. monthly and \$90. yearly was plaintiff's established license fee, and *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F. (2d) 282 (C.C.A. 8, 1939), where defendant admitted actual net profit of \$5.10—are sufficient evidence of this. Obviously in such situations, if the District Court cannot award such statu-

tory damages "as to the Court shall appear to be just" within the limits stated, the effectiveness of the Copyright Act is destroyed and it is reduced to its state of impotency prior to 1909 when unscrupulous persons could infringe copyrights with impunity.

The discretion of course lies with the District Court whether to award statutory damages "in lieu" of actual damages and profits of \$250. up to \$5000. As Judge Booth said in Fargo Mercantile Co. v. Brechet & Richter Co., 295 F. 823 (C.C.A. 8, 1924) at 829:

"We think election to award what are known as statutory damages in lieu of actual damages vests with the court, and that it is for the court to decide what kind of damages best fits the case. Exercising the authority given by the statute (Sec. 25(b) the court awarded statutory damages. The practice is well established. Westermann v. Dispatch Co., 249 U.S. 100; No-Leak-O-Piston Ring Co. v. Norris, 277 F. 951 (C.C.A. 4, 1921)"

In failing or waiving his right to prove actual damages and profits, (*General Drafting Co. v. Andrews*, 37 F. 2d. 54 at 57 (C.C.A. 2, 1930) the plaintiff, of course, takes his chances on the amount of statutory damages the District Court will award in its discretion between the minimum of \$250. and the maximum of \$5000. In any event, if he proves infringement, he is entitled to the minimum statutory damages of \$250. *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 at 106-107 (1919); *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202 at 207-8 (1931). *But neither can the defendant control the court's discretion and prevent it from awarding statutory damages, by admitting small actual profits which it would be willing to pay—as the defendant sought to do in admitting \$5.10 actual profit in Johns & Johns Printing Co. v. Paull-Pioneer Music*

Corp., 112 F. 2d. 282 at 283-4 (C.C.A. 8, 1939), and as the Petitioner is trying to do here. Presumably, for instance, the Petitioner here is willing to pay some 2% of its gross profits of \$899.16, or \$17.98. In the present case the Petitioner of course did not prove its *actual* net profits, after deducting selling expenses,—but if it had, or it admits a small amount of actual net profits which it would be willing to pay—it still cannot prevent the District Court in its discretion from awarding such statutory damages “in lieu” thereof as “shall appear to be just”. Unless Section 101(b) is thus construed as Congress intended, its purpose is defeated, and “the ineffectiveness of the remedy” will again certainly encourage “wilful and deliberate infringement” as this Court pointed out in *Douglas v. Cunningham, supra*.

Allowing the District Court the full discretion whether to award actual damages and profits, or in lieu thereof such statutory damages “as to the court shall appear to be just” within the limits stated, as Congress intended, automatically takes care of the easy case where the infringement was innocent, accidental or trifling, and the hard case where the infringement is deliberate, wilful and tainted with perjury and fraud, as in the case at bar. As Mr. Justice Van Devanter said in *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 at 106:

“In other words the court’s conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid,”

and as Judge Knapp said in *Campbell v. Wireback*, 269 F. 372 at 376 (C.C.A. 4, 1920) in affirming an award of \$5000. statutory damages:

“The case is an aggravated one in many ways, and the damages inflicted by the unconscionable conduct

of defendants are properly measured, as the quoted decision holds, by 'the Court's conception of what is just'—

We submit that there can be no question whatever as to the power of the District Court to award statutory damages of \$5000. in the circumstances of this case. If Petitioner believes Sec. 101(b) should be changed, its remedy lies with Congress. As Mr. Justice Brandeis said in *Jewell Realty Co. v. Buck* (*supra*) (p. 207-8):

"If, as applied to musical compositions, the provisions of the entire section are proved unreasonable, the remedy lies with Congress."

But we respectfully submit that the facts of the present case do not present a very appealing argument to Congress for changing the law, nor to this Court for destroying the effectiveness of the Copyright Act by construing Sec. 101(b) in the manner contended by Petitioner.

PETITIONER'S CASES (PAGES 13-15) DISTINGUISHED

Sec. 101(b); of course, gives the copyright proprietor the right to recover *actual* damages and *actual* profits, if he can prove them with the certainty required by law. Thus, as in any case where a plaintiff is given a choice of remedies, he is entitled to elect his remedy, and in a copyright case, under Sec. 101(b), he may expressly recover actual damages and profits, if he can prove them, and in that situation is not required to accept statutory damages from \$250. to \$5000., which might be awarded by the Court. Obviously in such a situation, where the plaintiff plainly seeks to recover his actual damages and defendant's actual profits, and waives his right to recover statutory damages, the "in lieu" clause of Sec. 101(b) is not involved. Thus the cases relied on by Petitioner are clearly distinguishable on their facts. There is nothing in the Court of Appeals.

decision below which conflicts with the cases relied on by Petitioner. They are all distinguishable on their facts.

In *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940), the plaintiff was plainly seeking to recover and had proved defendant's *actual profits* of some \$587,000, and had expressly waived his right to statutory damages of \$5000 'in lieu' thereof. Chief Justice Hughes therefore correctly said (p. 399):

"We agree with petitioners that the 'in lieu' clause is not applicable here; as the profits have been proved and the only question is as to their apportionment."

Obviously the "in lieu" clause was not applicable in that case. The plaintiff had elected to recover defendant's *actual profits*, as Section 101(b) expressly permits.

In *Sammons v. Colonial Press, Inc.*, 126 F. (2d) 341 (C.C.A. 1, 1942), the plaintiff clearly sought to prove and recover the *actual profits* made by both Larkin, the publisher, and Colonial Press, the printer. The District Court found that Larkin had made some \$7200 profit, but that the printer had made none. The District Court gave judgment for \$7236 against Larkin and \$250 statutory damages against the printer. On appeal the plaintiff expressly challenged the finding that Colonial Press had made no actual profit, and particularly the allowance of a deduction of \$2936 for "overhead expenses" (p. 348), and in addition sought to make the printer jointly liable for the profits made by Larkin, who apparently was judgment proof. The Court of Appeals affirmed, holding there was no joint liability for Larkin's profits, but remanded the case for further proofs as to the printer's profits, questioning the propriety of the deduction allowed for "overhead expenses" by the printer.

We submit that the case is properly distinguished on its facts in the decision of the Court below (R. pp. 276-279). We submit that the rule there stated was correct, as applied

to the facts of the case, but was not applicable to the different facts of the case at bar. There the plaintiff had elected to recover defendant's *actual* profits, and not statutory damages—even on the appeal. If plaintiff's contentions were correct that the “overhead expenses” were improperly deducted in determining Colonial's profits, it was entitled to recover “actual profits” of \$2936 from Colonial. The plaintiff obviously *did not elect* to recover statutory damages, because the maximum award he could have obtained was \$2812 from both defendants—i.e., 2812 books at \$1 per copy (p. 344). And to recover such statutory damages the plaintiff would have had to surrender its judgment for \$7236 *actual* profits against Larkin. Obviously the facts are different in the present case, where plaintiff waived its right to actual damages and profits, and “in lieu” thereof was awarded statutory damages.

In *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F. (2d.) 354 (C.C.A. 9, 1947) suit was brought for infringement of a copyrighted motion picture photoplay. The plaintiff plainly sought actual damages and actual profits, and not statutory damages, the maximum amount of which could only have been \$5000. The District Court awarded actual damages in the amount of \$40,000. and the Court of Appeals affirmed. Obviously, actual damages and profits having been proved there was no occasion for the award of statutory damages. As Judge Stephens said (p. 378):

“Award of statutory damages in the terms of the statute is proper only in the absence of proof of actual damages and profits. The court having found the extent of both, the point fails. The court awarded actual damages, holding the award on that basis as adequate without resorting to the use of statutory damages. We find no error in this course.”

Davilla v. Brunswick-Balke Callender Co., 94 F. (2d) 567 - (C.C.A. 2, 1938), was wrongly decided on its facts and is

contrary to the decision of this Court in *Douglas v. Cunningham*, 294 U.S. 207. The decision of the District Court (Judge Leibell) in 19 F. Supp. 819 (at pp. 819-820) makes it clear that there was no proof of actual damage to the plaintiff, nor of actual profits by the defendant, that 5285 infringing records were sold and that the District Court made the award of \$5000 "as a statutory award of damages in lieu of actual damages and profits." The District Court could have found some *actual* profit, but "in lieu" thereof, and in its discretion, awarded statutory damages instead. At the rate of \$1 per infringing copy, the maximum award of \$5000 was plainly justified under the statute, and could not be reversed on appeal, under *Douglas v. Cunningham*. We submit that the statement in Judge Manton's opinion (p. 570):

"Since the amount of sales was sufficiently proved, there was no basis for an award of statutory damages" —

was clearly wrong. *The amount of sales had to be proved to serve as the basis for awarding statutory damages at the rate of \$1 per infringing copy, just as in Douglas v. Cunningham.*

However, we respectfully submit that this Court should not take up the case at bar, which was rightly decided on its facts, merely to correct the *Davilla* case, which was wrongly decided on its facts, and in which this Court has already denied certiorari (304 U.S. 572). The Court of Appeals herein was not misled by the *Davilla* case, and no other court need be. It is contrary to *Douglas v. Cunningham*.

In *Malsed v. Marshall Field Co.*, 96 F. Supp. 372 (D.C. W.D. Wash. N.D. 1951), the plaintiff proved no actual damages, but defendant's actual profits of \$100 were proved. But here the District Court (Judge Yankwich) in its dis-

cretion gave judgment to the plaintiff for \$100 defendant's actual profits, obviously because the infringement was innocent and accidental. This, of course, the Court could properly do in its discretion under Section 101(b). The Court with equal propriety could have awarded statutory damages of \$250 — as in *Widenski v. Shapiro, Bernstein Co.* (*supra*, C.C.A. 1, 1945) — or \$500 for 500 infringing labels at \$1 per label.

We respectfully submit, therefore, that the above cases relied on by appellant in support of its position are clearly distinguishable on their facts and present no new rule of law requiring clarification by this Court.

III. REPLY TO PETITIONER'S POINT II.

The Petitioner contends that the decision of the Court of Appeals sanctions departures in overall color, material, size and appearance from a copyrighted work in violation of the Copyright Act.

This point likewise is wholly without merit. It is completely answered by the facts established in this case. These show that the Lepere Pottery Company *directly copied* from one of Respondent's plaster models of its copyrighted Cocker Spaniel in Show Position, similar to PIF's, Exh. 5, which were available on the open market. Lepere used this as a physical model for making the mold from which it reproduced the infringing models sold by Petitioner.

There was no question of law presented, regarding infringement, therefore, and no question of "sanctioned departures from the copyrighted work of art."

There is also no question of monopoly here, nor of "extension of the legalized monopoly." The Lepere Pottery was entirely free to make any sculpture of a Cocker Spaniel in Show Position that it wanted, *if it did its own original work*. Instead Lepere Pottery merely copied and duplicated the plaintiff's copyrighted work. There are in the

Record (Plf's. Exh. 12, R. p. 90 and Plf's. Exh. 14, R. pp. 93-94), two other models of Cocker Spaniels in Show Position which do not infringe Respondent's copyright. The first is by Mr. Press, a sculptor and one of the owners of Respondent Company, made to replace Miss Philbrick's model, and the other is by a competitor, the Mortens Studio. Naturally they differ in details, because both of these sculptors did their own original work. Lepere did not.

It is, of course, elementary that a copyright is not a monopoly — any more than a man's house, his horse, his automobile. Others are free to build houses, acquire horses or automobiles of their own. But they cannot steal property which someone else has created. Lepere Pottery could make its own Cocker Spaniel in Show Position, but it could not steal Respondent's copyrighted work. Petitioner confuses copyright with the physical article embodying the copyright — a distinction preserved in Sec. 27 of the Copyright Act. A copyright is intellectual property and is protected like any other kind of personal property — not because it is a monopoly but because it is the product of a man's mind. As Drone on Copyright well states (p. 4):

"The principle is as old as property itself, that what a man creates by his own labor, out of his own materials, is his own to enjoy to the exclusion of all others."

Blackstone thus defined monopoly:

"A license or privilege . . . whereby the subject in general is restrained from that liberty of manufacturing or trading *which he had before*"

A monopoly takes away from the public the enjoyment of something which the public before possessed. But a copyright (and a patent) does not do this, for it does not apply to anything which the public before possessed. The same specious argument was raised in the recent case of *Alfred Bell & Co. v. Cataldo Fine Arts, Inc.*, 191 F. (2d) 99 (C.A.

2, 1951), which Judge Frank disposed of in the following language (p. 103):

"The 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before; *similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his. . . . Hence it is possible to have a plurality of valid copyrights directed to closely identical or even identical works. Moreover, none of them, if independently arrived at without copying, will constitute an infringement of the copyright of the others.*"

And see —

Fred Fisher Inc. v. Dillingham, 298 F. 145, at 150-151 (D.C.S.D.N.Y. 1924).

Lawrence v. Dana, 15 Fed. Cas. 26 at 60.

We respectfully submit that Petitioner's Point II is without merit.

IV. CONCLUSION.

We respectfully submit that the judgment of the Court of Appeals in affirming the judgment of the District Court was correct and fully supported by the evidence of record herein, and that the petition presents no questions of law requiring the exercise of this Court's discretionary jurisdiction, and should be denied.

Respectfully submitted,

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May 1952.

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